

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JOHNNY LINDEL LEWIS,

No. C-14-0071 EMC (pr)

Petitioner,

**ORDER DENYING PETITION FOR  
WRIT OF HABEAS CORPUS**

v.

ELVIN VALENZUELA, Warden,

Respondent.

**I. INTRODUCTION**

Johnny Lindel Lewis filed this *pro se* action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent has filed an answer to the petition and Mr. Lewis has filed a traverse. For the reasons discussed below, the Court **DENIES** the petition.

**II. BACKGROUND****A. Facts**

Mr. Lewis was charged with murder and other crimes in a case in which the prosecutor's theory was that he had stabbed the victim, Robert Van Alstine, in the early hours of November 18, 2009. The California Court of Appeal described the evidence at length.

On November 18, 2009, shortly after 4:00 a.m., Jorge Briseno heard banging at the door of the mill where he worked in Fields Landing. Upon opening the door, Van Alstine stepped into the mill and fell to the floor, holding his stomach. Van Alstine said: "Help me. Help me please. I'm dying" Briseno called 911 and reported that Van Alstine was bleeding from his stomach, said he had been stabbed and was dying, but would not say who had stabbed him.

When police arrived, Van Alstine was unable to intelligently answer questions. He was transported to a hospital where it was determined that he had a critical wound to his lower right chest. Efforts to save Van Alstine were unsuccessful and he died.

1 An autopsy revealed that the primary wound was a single stab wound to the right chest. The  
2 wound was consistent with a person holding a knife slightly less than an inch wide in his  
3 right hand, standing with the victim's back toward the person holding the knife, reaching  
around the victim, and stabbing the victim in the right rib area. The knife penetrated the liver  
and the cause of death was the stab wound.

4 Van Alstine's residence was in Eureka above the California Market, which had video  
5 surveillance equipment installed. Detectives reviewed the video recordings and, based on the  
6 clothing he was wearing when he died, Van Alstine seemed to be in the recording about 3:55  
a.m. on November 18, when a man got out of the passenger side of what appeared to be a red  
car and approached him. Van Alstine and the other man then moved outside of the camera's  
field.

7  
8 On November 21, 2009, officers found a burned-out pink Ford Escort in a driveway. The  
9 owner of the residence said the car was not there earlier and he did not know to whom it  
10 belonged. The registered owner of the car, Andrea Marr, had reported it stolen. On the floor  
11 next to the passenger seat on the right side was the metal portion of a knife that was  
approximately four and a half inches long and three-quarters of an inch wide. The knife  
tested negative for blood, but the criminologist who tested the knife testified that it was  
possible to remove traces of blood from a knife and that a knife that had been in a fire would  
not be expected to test positive for blood.

12 Examination of Marr's cell phone records indicated that on November 18, 2009, at 3:36 and  
13 3:48 a.m. her cell phone used a tower in Eureka. At 4:07 and 4:13 a.m. her cell phone used a  
tower in Loleta. At 4:34 and 4:40 a.m. her cell phone used towers heading south.

14 On November 24, 2009, detectives interviewed Marr, who said that she spent the nights of  
15 November 17 and 18, 2009, at home. She said she recognized Van Alstine from seeing his  
16 photograph in the newspaper but did not know him. Marr said she never loaned her car or  
cell phone to anyone. She said she parked her car and must have left the key in the door.  
When she returned, her car was gone. She denied being outside Eureka on November 18,  
2009, and denied knowledge of the homicide or the people involved. She was not able to  
17 explain her vehicle being on the video surveillance recording or her cell phone making and  
receiving calls leaving Eureka and returning during the early morning hours.

18 Marr was arrested and charged with murder, at which point she made a different statement to  
19 the police. Marr testified at trial that in November 2009 she gave her friend, Maggie  
Sovereign, a ride from the clean and sober house where Sovereign lived in Eureka to  
20 Friendship House, a rehabilitation facility in San Francisco. Lewis, whom Marr knew as  
"Johnny George," Sovereign's boyfriend, rode with them. After dropping off Sovereign,  
21 Marr said she drove back to Eureka with Lewis. They arrived in Eureka in the middle of the  
night and Marr said that Lewis had been drinking Tequila on the way back. Marr related that  
22 Lewis had been upset about not seeing Sovereign for the six months she would be in  
treatment and that, in his emotional state, she did not want to leave him alone, so they drove  
23 around Eureka together.

24 Marr said that when they neared California Market, Lewis saw a man, whom Marr later  
25 learned to be Van Alstine, and asked Marr to pull over so he could talk to him. Lewis got out  
of the car, Marr explained, and asked Van Alstine if he wanted to go drink. Van Alstine  
26 agreed and got into the back seat. Marr testified that Lewis directed her to drive to Fields  
Landing. She remembered that Lewis told her that night that Van Alstine had slept with  
Sovereign during a period when Lewis was in jail, but she didn't remember at what point  
27 Lewis told her this.  
28

1 Marr said that she parked in Fields Landing at Lewis's direction and Lewis and Van Alstine  
2 got out of the car. A couple of minutes later Marr said that she saw them fighting in her  
3 rearview mirror and she turned around to watch. She said that Lewis was punching Van  
4 Alstine, who was trying to block the punches. The fight ended when Lewis, who was behind  
5 Van Alstine, appeared to Marr to punch Van Alstine at a "weird angle" on his right ribs, after  
6 which Van Alstine ran away, yelling, "Johnny, I don't remember. I don't even know who  
7 your girlfriend is." According to Marr, Lewis returned to the car and told her to drive away  
8 with her headlights off, that he had to get rid of the knife, and that Van Alstine was going to  
9 die. Marr then drove back to Eureka with Lewis, but they may have first visited the house of  
10 Keta Rojas in Fields Landing. Marr did not remember whether the visit to Rojas's house  
11 occurred before or after Lewis's altercation with Van Alstine.

12 Marr later showed detectives Rojas's house and the location where the stabbing had  
13 occurred, approximately one-tenth of a mile from the mill where Van Alstine was found.  
14 Back in Eureka, Marr said that she and Lewis went to the home of Johnny Mahan, where  
15 Lewis washed the knife in the kitchen sink. Marr believed that Lewis traded the knife to  
16 Mahan for two wooden poles.

17 Over the next couple of days, Marr saw Jamie Rogers in Lewis's company. The last time  
18 Marr saw her car was when Rogers took it so that she could remove stickers and make it look  
19 less identifiable because the newspapers had reported that a car was observed in the  
20 California Market video surveillance. Rogers returned and told Marr to report the car stolen.

21 After making a statement to police, Marr pled guilty to being an accessory to murder after  
22 the fact, with a plea agreement specifying that if she testified against Lewis, she would be  
23 sentenced to probation and not to prison. Under the plea agreement, the murder charge was  
24 dropped.

25 Around 1:30 a.m. on December 4, 2009, Lewis was arrested for possession of a hypodermic  
26 needle and he was interviewed by Sergeant Wayne Hanson later that morning. Initially,  
27 Lewis could not recall anyone he knew with a red sedan, but when Hanson asked about  
28 Marr, Lewis admitted having ridden in her car with Sovereign, but only to pick up a  
prescription once during the daytime. Lewis claimed not to have been in Fields Landing for a  
few months. Hanson finally asked Lewis about riding in Marr's car about two weeks earlier,  
and Lewis admitted riding in the car when Marr took Sovereign to Friendship House but  
claimed to have gone straight back to the clean and sober house in Eureka. Hanson showed  
Lewis a photograph of Van Alstine and Lewis admitted knowing him on a casual basis, but  
said that he had not seen him for "a handful of months."

On further questioning, Lewis admitted that two to three weeks earlier, at six or seven in the  
evening, Marr was driving him to the store and that during the trip Marr had also given Van  
Alstine a ride and dropped him off somewhere. Then Lewis recalled that Van Alstine had  
jumped into the car with a friend of his, whom Lewis did not know, and Marr dropped them  
off at some apartments around midnight. Lewis denied getting into a fight with Van Alstine.  
Lewis also denied going to Fields Landing with Van Alstine. Questioned further, Lewis  
admitted to being in Fields Landing with Van Alstine "at Kita's." Lewis said that Van  
Alstine and his friend left the car in Fields Landing and he didn't know where they went. For  
the remainder of the interview, Lewis continued to deny fighting with Van Alstine or  
knowing who had stabbed him.

Jared Stapp lived at the clean and sober house where Sovereign and Lewis also lived. Stapp  
contacted police and told them that Lewis had told him that he had killed someone. He also  
said that there had been blood in a van that he had bought from Sovereign and that Lewis had  
left a sword at the clean and sober house. Detectives determined that the blood in the van  
was from a time before the Van Alstine homicide. Stapp showed the sword to an

investigating officer, but police determined that it had nothing to do with the case. Stapp also said that when Sovereign went to San Francisco, a friend drove her there and Lewis accompanied them. Stapp told the officer that Lewis had not returned to the clean and sober house that night, that he did not see Lewis for several days after Sovereign left, and that when Lewis did return, Lewis told him, "I killed somebody."

Rojas testified to having no memory of a visit by Lewis and Marr to her apartment in Fields Landing on November 18, 2009. However, cell phone records showed that the cell phone that Rojas was using sent a text message to Marr's phone at 6:16 a.m. on November 18, 2009: "Hey, it's Keta. Please don't stop by again until late morning when baby's awake. Thanks."

The police searched Mahan's house for a knife that Lewis may have used. Mahan said that he and Lewis often traded items and that he had once lent Lewis a Gerber knife, but that Lewis had returned it "a long time ago." The police took all of Mahan's knives, but none of them tested positive for blood. In a recorded conversation with police, Mahan said that the last time Lewis had been there, they argued about Sovereign and Lewis told him "don't put your hands in your pocket, like (inaudible) people are going to get stuck around here. Saying he was going to stab people or whatever...."

Hannah Mouser lived with Mahan, her boyfriend. She confirmed that Lewis and Mahan often traded items, including knives. Mouser said that Lewis and Mahan had argued because she was mad at Mahan and told Lewis, falsely, that Sovereign had sat on Mahan's lap. When detectives interviewed Mouser, she first confirmed that Lewis had traded a knife for sticks, but then said she was not sure the trade had actually occurred.

Lewis's clothes were collected and presumptive tests for blood were positive on his tennis shoes, T-shirt, and black hooded sweatshirt. Blood was conclusively found only on the T-shirt. A DNA test was performed and showed that the blood was Lewis's own blood.

California Court of Appeal Opinion filed June 27, 2012 in *People v. Lewis*, No. A130600 (hereinafter "Cal. Ct. App. Opinion") at 1-6. (The opinion is at Docket # 21-3.)

#### B. Procedural History

Mr. Lewis was convicted in Humboldt County Superior Court of first degree murder with personal use of a deadly and dangerous weapon. On October 12, 2010, Mr. Lewis was sentenced to at total of 26 years to life in prison.

He appealed. The California Court of Appeal affirmed his conviction and the California Supreme Court denied his petition for review in 2012.

Mr. Lewis then filed this action. His petition for writ of habeas corpus raised four claims: (1) the trial court erred in admitting his statement to police as evidence at trial because he did not knowingly, intelligently, and voluntarily waive his rights under *Miranda v. Arizona*, 384 U.S. 486 (1966) and did not voluntarily make the statement; (2) his due process rights were violated by admission of evidence, unrelated to the crime, concerning weapons in his possession, blood on his

1 clothing, and blood in a van he once owned because that evidence tended to show criminal  
2 propensity; (3) trial counsel provided ineffective assistance by (a) failing to request a limiting  
3 instruction regarding evidence of a knife that Mr. Lewis had borrowed; and (b) failing to renew his  
4 objection to admission of evidence of blood found on Mr. Lewis' clothing. Respondent has filed an  
5 answer and Mr. Lewis has filed a traverse.

### 6 **III. JURISDICTION AND VENUE**

7 This Court has subject matter jurisdiction over this action for a writ of habeas corpus under  
8 28 U.S.C. § 2254. 28 U.S.C. § 1331. This action is in the proper venue because the petition  
9 concerns the conviction and sentence of a person convicted in Humboldt County, California, which  
10 is within this judicial district. 28 U.S.C. §§ 84, 2241(d).

### 11 **IV. STANDARD OF REVIEW**

12 This Court may entertain a petition for writ of habeas corpus "in behalf of a person in  
13 custody pursuant to the judgment of a State court only on the ground that he is in custody in  
14 violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

15 The Antiterrorism And Effective Death Penalty Act of 1996 ("AEDPA") amended § 2254 to  
16 impose new restrictions on federal habeas review. A petition may not be granted with respect to any  
17 claim that was adjudicated on the merits in state court unless the state court's adjudication of the  
18 claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of,  
19 clearly established Federal law, as determined by the Supreme Court of the United States; or  
20 (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the  
21 evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

22 "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court  
23 arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the  
24 state court decides a case differently than [the] Court has on a set of materially indistinguishable  
25 facts." *Williams (Terry) v. Taylor*, 529 U.S. 362, 412-13 (2000).

26 "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the  
27 state court identifies the correct governing legal principle from [the Supreme] Court's decisions but  
28 unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. "[A] federal

habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” *Id.* at 411. “A federal habeas court making the ‘unreasonable application’ inquiry should ask whether the state court’s application of clearly established federal law was ‘objectively unreasonable.’” *Id.* at 409.

## V. DISCUSSION

### A. Mr. Lewis’ Statement to Police

Mr. Lewis was arrested shortly after midnight on December 4, 2009. After several hours of sleep,<sup>1</sup> he was interrogated by sergeant Hanson while in custody. Mr. Lewis filed an unsuccessful motion to suppress his statement to police. At trial, the prosecution introduced a redacted transcript of the interview and played the audio portion of the videotaped interrogation.<sup>2</sup> Mr. Lewis contends that his statement was inadmissible because his waiver of rights was not knowing, intelligent and voluntary. He further alleges that the waiver and statement were involuntary due to improper police tactics, namely that the police took advantage of the fact that he was experiencing drug withdrawal symptoms and had a hangover at the time he was being interviewed.

#### 1. Knowing And Intelligent Waiver Of Miranda Rights

##### a. State Court Rejection Of Claim

The California Court of Appeal concluded that Mr. Lewis knowingly, intelligently, and voluntarily waived his rights to silence and to counsel, and voluntarily made his statement to the police. Having made those determinations, the state appellate court declined to decide whether any error would have been harmless. The state appellate court explained its decision:

When Hanson interviewed Lewis he did not initially provide a Miranda warning. Lewis’s statements made before the warning are not at issue and after a brief exchange, Hanson said: “Cause you’re, you’re in jail so you have the right to remain silent. Anything that you say can and will be used against you in a court of law. You have the right to have an attorney and

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<sup>1</sup> Mr. Lewis was arrested shortly after midnight, and was interrogated at about 7:45 a.m. *See* Docket # 19-1 at 17.

<sup>2</sup> The redacted portions “included statements that Lewis was in handcuffs during the interview, information related to other crimes, reference to the polygraph, and Hanson’s assertions during questioning that ‘all the witnesses’ said that Lewis stabbed Van Alstine.” Cal. Ct. App. Opinion at 7.



1 to have an attorney present before and during questioning. If you can not afford an attorney,  
2 one will be appointed free of charge to represent you before and during questioning if you  
3 desire, uh you can, you can decide at any time to exercise these rights and not answer any,  
4 excuse me, you can decide at any time to exercise these and not answer questions or make  
any statements, do you understand these, of these rights I explained to you?" Lewis said, "I  
yeah I understand what you're saying." Hanson shortly thereafter again asked Lewis, "Okay,  
well I mean you understand your rights right?" Lewis answered, "Yeah."

5 Hanson attempted to obtain an explicit verbal waiver from Lewis, several times asking if  
6 Lewis wanted to talk with him. Lewis would not answer directly, instead explaining that he  
7 didn't understand what was going on, but nonetheless talking with Hanson. Finally, Hanson  
8 said, "Okay well, well it sounds like you're willing to talk to me, you understand your rights  
and you're willing to talk to me, is that correct.?" Lewis again did not answer directly, but  
asked what they were going to talk about. From that point, Lewis continued to talk for an  
extended period of time with Hanson.

9 Lewis told Hanson several times that he was "lost" and didn't understand what was going on:  
10 "I don't know what's going on here"; "um I'm kind of lost right now" I mean all I know is  
11 that I got arrested last night and they found a hypodermic on me"; "I don't know, I don't  
12 know what's going on man ... I'm like basically—what I'm saying is I'm kind of lost right  
13 now"; "well I know I'm getting arrested for a hypodermic and I'm sitting here in front of you  
and your reading me my rights"; I'm not understanding what's going on"; "I'm kind of lost a  
little bit"; "I'm kind of lost right now"; "I'm just like I'm kind of lost, I'm just waking up,  
um, and I'm like wow I mean."

14 Lewis argues that his expressions about not understanding what was going on and being  
15 "lost" indicate so confused a state of mind that he could not knowingly and intelligently  
16 waive his Miranda rights. The interview as a whole, however, does not indicate a confused  
state of mind. Lewis talked with Hanson for an extended period. Lewis understood Hanson's  
questions and he provided meaningful responses, gradually providing more information as it  
became apparent that prior statements would not satisfy Hanson.

17 When Lewis stated that he was "lost" and did not know what was going on, he knew that he  
18 had been arrested for possession of a hypodermic needle and was being questioned by police,  
19 but there was no reason for him to assume that he was a suspect in Van Alstine's murder,  
20 which occurred more than two weeks earlier. Without other indicia of confusion, Lewis's  
21 statements about not knowing what was going on and about being "lost" are most naturally  
interpreted as lack of awareness of the purpose of the questioning. We do not discern such a  
state of mental confusion that Lewis was unaware of the meaning of his rights or the use to  
which his statements might be put. Nor were there indications that Lewis was so confused  
that he could not knowingly and intelligently waive the rights secured by Miranda.

22 Late in the interview, Hanson told Lewis, "Okay we'll end the conversation and the next  
23 time I bring you down, I'll have a polygraph set up for you." Lewis responded, "You know I  
24 mean it's like fucking well can we, what you can do that without a lawyer[?] I mean I'm like  
(inaudible) I don't even got a lawyer [. ] I mean how can you just force all this with out a  
25 lawyer[?] I mean I'm not trying you know what I mean I know my rights a little bit  
(inaudible)." Lewis contends that this statement demonstrates that he did not have a basic  
26 comprehension of the right to have counsel present during the questioning. However, this  
statement, in context, does not concern his right to have an attorney present during the  
27 interview then taking place. Instead, Lewis was challenging whether Hanson could, in the  
future, actually compel a polygraph examination without advice from counsel. The remark  
28 does not indicate that Lewis was unaware of his right to the presence of counsel; rather, it  
indicates that Lewis fully understood his right not to undergo a polygraph examination  
without the benefit of an attorney, should he request one.

Hanson provided Lewis a valid Miranda warning and Lewis expressly stated that he understood his rights. Lewis then talked at length with Hanson in a way that demonstrated that he understood Hanson's questions and that, as the interview went on, he understood he was a suspect in the murder of Van Alstine. Contrary to Lewis's contentions, we do not find evidence, considering the interview as a whole, that Lewis exhibited extreme mental confusion or a misunderstanding of his rights. We conclude that by his behavior, Lewis implicitly waived his rights and that this waiver was knowing and intelligent.

Cal. Ct. App. Opinion at 8-11 (footnote omitted).

b. Analysis

A person subjected to custodial interrogation must be advised that "he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Once properly advised of his rights, an accused may waive them voluntarily, knowingly, and intelligently. *See id.* A valid waiver of *Miranda* rights depends upon the totality of the circumstances. "The waiver inquiry 'has two distinct dimensions': waiver must be 'voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception,' and 'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" *Berghuis v. Thompson*, 560 U.S. 370, 382-83 (2010) (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). Although some earlier Supreme Court cases had indicated the government had a "heavy burden" to show waiver, *Berghuis* explained that the burden was not too onerous. *Berghuis*, 560 U.S. at 384. The waiver may be implied by conduct, and need not be explicit or written. *Id.* at 383.

If the State establishes that a Miranda warning was given and the accused made an uncoerced statement, this showing, standing alone, is insufficient to demonstrate "a valid waiver" of Miranda rights. The prosecution must make the additional showing that the accused understood these rights. Where the prosecution shows that a Miranda warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent. . . . As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford.

*Berghuis*, 560 U.S. at 384-85 (citations omitted).

The California Court of Appeal's determination that Mr. Lewis knowingly and intelligently waived his *Miranda* rights was not contrary to or an unreasonable application of these Supreme



1 Court holdings. Although Mr. Lewis did not expressly waive his *Miranda* rights, his behavior  
2 showed an implied waiver of those rights. Mr. Lewis stated that he did “understand what you’re  
3 saying” after sergeant Hanson read him his *Miranda* rights. CT 140. And, when asked a second  
4 time – “Okay well I mean you understand your rights right?” – Mr. Lewis responded, “yeah.” CT  
5 141. He thereafter began talking but avoided providing an explicit verbal waiver of his *Miranda*  
6 rights. After a couple of comments, sergeant Hanson said, “Okay well, well it sounds like you’re  
7 willing to talk to me, you understand your rights and you’re willing to talk to me, is that correct?”  
8 CT 141. Mr. Lewis responded, “What are we gonna talk about?” rather than expressing any desire  
9 not to talk. CT 141.

10 Mr. Lewis argues that his repeated comments that he was “lost” and did not understand what  
11 was going on showed that he did not make a knowing and intelligent waiver of his *Miranda* rights.  
12 The state appellate court rejected this argument, concluding that the totality of the interview did not  
13 indicate a confused state of mind – Mr. Lewis understood the questions and provided meaningful  
14 responses. That was not an unreasonable determination of the facts in light of the record. *See, e.g.,*  
15 *Sechrest v. Ignacio*, 549 F.3d 789, 805-06 (9th Cir. 2008) (finding petitioner’s waiver knowing and  
16 voluntary where officer’s questions to petitioner after petitioner was read his *Miranda* rights were  
17 requests for clarification of petitioner’s unclear statements regarding his desire to speak to police);  
18 *Paulino v. Castro*, 371 F.3d 1083, 1086-87 (9th Cir. 2004) (statement that suspect understood his  
19 rights and wanted to talk to officer sufficient to waive right to counsel); *United States v. Parra*  
20 *Cazares*, 121 F.3d 1241, 1244 (9th Cir. 1997) (recitation of rights in English and supervision of  
21 reading in Spanish, accompanied by officer’s confirming that defendant understood his rights,  
22 sufficient to establish that defendant knew his rights and knowingly and intelligently waived them).  
23 Like the state court, this court does not see Mr. Lewis’ comments as reflecting confusion about the  
24 *Miranda* rights. If anything, Mr. Lewis was perplexed – or at least tried to convey to the sergeant  
25 that he was perplexed – as to why an interrogation was necessary since he had been arrested on only  
26 a misdemeanor drug charge. Mr. Lewis has identified no authority supporting the view that a  
27 suspect’s unawareness of the particular crime for which he is being interrogated does not make the  
28 *Miranda* waiver unknowing or unintelligent. *Cf. Colorado v. Spring* 479 U.S. 564, 576 (1987) (“we

1 hold that a suspect's awareness of all the possible subjects of questioning in advance of interrogation  
2 is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived  
3 his Fifth Amendment privilege").

4 2. Voluntary Waiver Of Miranda Rights

5 a. State Court Rejection Of Claim

6 The California Court of Appeal also rejected Mr. Lewis' argument that his waiver and  
7 statement were involuntary. The state appellate court recited the basic standards for voluntariness of  
8 a waiver and cited a state court case as authority for the rules on voluntariness of waiver, although  
9 the rules parallel those articulated by the U.S. Supreme Court. *See* Cal. Ct. App. Opinion at 11  
10 (quoting *People v. McWhorter*, 47 Cal. 4th 318, 346-47 (2009)). The *McWhorter* case cited, among  
11 other authorities, *Mincey v. Arizona*, 437 U.S. 385, 398 (1978), for the proposition that a statement is  
12 not voluntary if it is not the product of "a rational intellect and free will," and *Colorado v. Connelly*,  
13 479 U.S. 157, 167 (1986), for the proposition that a "finding of coercive police activity is a  
14 prerequisite to a finding that a confession was involuntary under the federal and state Constitutions."  
15 The California Court of Appeal explained its rejection of the challenge to the voluntariness of Mr.  
16 Lewis' statement.

17 Lewis first argues that the police deceived him into believing that the questioning would be  
18 brief and would concern his arrest for possession of a hypodermic needle. One of Hanson's  
19 early questions was, "Did you get arrested last night?" Lewis believes that this indicated that  
20 this arrest would be the topic of the interview. When Lewis asked to use the bathroom,  
21 Hanson responded, "Yeah well this may only take a second" and that they would "get to the  
22 bathroom request here in a second." Lewis does not explain how this "deception" operated to  
23 coerce his waiver or statement in conjunction with his symptoms of drug withdrawal.  
24 Knowing that he would be questioned about matters unrelated to the reason he was arrested  
25 and that the interview might be lengthy "could affect only the wisdom of a Miranda waiver,  
26 not its essentially voluntary and knowing nature." (*Colorado v. Spring* (1987) 479 U.S. 564,  
27 577.) Hanson made no threats or promises and did not exert improper influence.

28 Second, Lewis contends that Hanson "trivialized and downplayed the importance" of his  
rights because, before informing Lewis of his rights, Hanson said, "Okay because you have  
those bracelets on, you're, you're in handcuffs, I have to read you your rights okay?" Lewis  
relies on *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1237: "[E]vidence of police efforts  
to trivialize the rights accorded suspects by the Miranda decision—by 'playing down,' for  
example, or minimizing their legal significance—may under some circumstances suggest a  
species of prohibited trickery and weighs against a finding that the suspect's waiver was  
knowing, informed, and intelligent."

Here, the fact that Lewis was in handcuffs, had been arrested, and was not free to leave  
meant that Hanson was proposing a custodial interrogation. Hanson's observation was

merely an acknowledgment that the circumstances required that the Miranda warnings be given. It is not an obvious inference that Hanson sought, by his comment, to trivialize or minimize the importance of Lewis's rights, nor does Lewis point to any additional evidence that would support such an inference. Indeed, Hanson asked Lewis three times whether he understood his rights, which is inconsistent with an attempt to minimize their importance. We discern nothing improper in Hanson's comment.

Third, Lewis contends that the police timed his arrest with knowledge that he would be suffering from the discomfort and withdrawal of recent drug use. He argues that during the interview he experienced obvious drug withdrawal symptoms and was questioned after only a few hours of sleep. During the interview, he stated numerous times that he was tired, hung over, detoxing, and had "cotton mouth." Lewis believes that "the police intentionally created the environment for appellant's physical condition to be exploited by additional physical and psychological pressures," rendering his waiver and statement involuntary.

When a defendant is experiencing the symptoms of drug withdrawal, that fact alone does not render a waiver or statement involuntary. (*U.S. v. Coleman* (9th Cir.2000) 208 F.3d 786, 791 ["Nor did Defendant's symptoms of heroin withdrawal render his statements involuntary. Although Defendant's heroin withdrawal caused lethargy and physical discomfort, such symptoms alone are insufficient to establish involuntariness."].) As indicated above, there must, in addition to the symptoms of drug withdrawal be some showing of coercive police activity as a necessary predicate.

At one point during the interview, Hanson told Lewis: "Since November the eighteenth ... there has been three detectives tracking you and everybody else in this case and people are talking so here we're sitting talking to you...." At another point, Hanson told Lewis that they had not arrested him earlier so that he "could sink [his] own boat by talking to everybody in Eureka." Neither this or anything else that Hanson said during the interview justifies an inference that Lewis's arrest was timed to take advantage of symptoms of drug withdrawal during his interrogation.

Having discerned no improper tactics on the part of the police in the interview with Lewis, we conclude that there was no coercion or inducement that operated to render Lewis's waiver or his statement involuntary. Without coercion, inducement or improper influence on the part of the police, Lewis's argument that his waiver and statement were involuntary fail. We are left with an argument based solely on Lewis's physical symptoms of drug withdrawal, which standing alone do not suffice to establish involuntariness and which were not so severe as to prevent Lewis from meaningfully answering Hanson's questions for an extended period. No circumstances of the interview support a conclusion that Lewis's waiver or statement were involuntary.

#### b. Analysis

Although the burden is on the government to prove voluntariness of a waiver of one's *Miranda* rights, a waiver cannot be held involuntary absent official compulsion or coercion. "*Miranda* protects defendants against government coercion leading them to surrender rights protected by the Fifth Amendment; it goes no further than that." *Colorado v. Connelly*, 479 U.S. at 170.

Mr. Lewis has not demonstrated that the state appellate court's opinion was contrary to, or an unreasonable application of, the clearly established federal law. After evaluating the circumstances surrounding the interrogation, the state appellate court found that there was no police coercion or inducement that rendered Mr. Lewis' waiver or statement involuntary. Cal. Ct. App. Opinion at 13. Federal law, as determined by the United States Supreme Court, requires that there be official compulsion or coercion to find a *Miranda* waiver involuntary. See *Colorado v. Connelly*, 479 U.S. at 170. Accordingly, the state appellate court's conclusion that, due to the absence of any compulsion, Mr. Lewis did not establish that his waiver was involuntary is not contrary to, or an unreasonable application of, clearly established federal law. Nor was the state appellate court's opinion based on an unreasonable determination of the facts. The facts do not support a finding of involuntariness due to Mr. Lewis' assertion that he was "detoxing" from drug usage and had a hangover. See *United States v. Rodriguez-Rodriguez*, 393 F.3d 849, 855 (9th Cir. 2005) (district court did not err in concluding that suspect who was experiencing acute heroin withdrawal, but who was nonetheless coherent, speaking and acting normally, voluntarily and intelligently waived his *Miranda* rights); *United States v. Coleman*, 208 F.3d 786, 791 (9th Cir. 2000) (defendant's symptoms of heroin may have caused lethargy and physical discomfort, but such symptoms alone are insufficient to establish involuntariness).

3. Mr. Lewis Did Not Invoke His Right To Counsel

Mr. Lewis mentioned the word "lawyer" three times in his interrogation and contends that this was an invocation of his right to counsel. The relevant comments occurred toward the very end of the interview, i.e., starting on page 81 of the 94-page interview transcript. The following was said by sergeant W. Hanson (WH) and Mr. Lewis (JL):

WH: I'm not fucking around with you at all Johnny, it, it, its, if you want to take a polygraph, you're a man you're twenty eight (28) years old, to prove that you're innocent that's that's your decision. Remember what I told you when you got back to your cell about everybody talking, or you wouldn't be here right now.

JL: (Inaudible) that copy pulled up and just huh, you know what I mean (inaudible).

WH: I sent them looking for you Johnny.

JL: Huh?

1 WH: I sent the cops looking for you, I got a phone call.

2 JL: You sent the cop looking for me, that's kind of funny because they'll all, they see me  
3 everyday, they never came and approached me about this then you know what I mean, that's  
4 why I'm like kind of thrown off here.

5 WH: Yeah because I told you there's been three (3) detectives on this since the eighteenth (18th)  
6 of November, I don't want to contact you on the nineteenth (19th) or twentieth (20th), I want  
7 you to sink your own boat by talking to everybody in Eureka.

8 JL: I'm talking to everybody, no no.

9 WH: Okay so.

10 JL: I mean I'm not.

11 WH: we'll, we'll get you downstairs here at two (2) o'clock for a uh, uh polygraph then?

12 JL: (inaudible) do this without a **lawyer**, because it's like, it's like you're like throwing all this at  
13 me.

14 WH: Uh huh.

15 JL: It's like and I'm sitting here like what's going on, you're arresting or you know what I mean.

16 WH: No, no, for the, for the fifth (5th) time, I'm not arresting you currently for a homicide you're  
17 in custody for the possession of a hypodermic needle,

18 CT 216 (emphasis added). After a few more exchanges, the sergeant repeatedly again asked  
19 whether Mr. Lewis would take a polygraph test, and the following was said.

20 WH: Yes or no are you willing to take a polygraph?

21 JL look I am detoxing right now, okay I'm, I'm trying to maintain a conversation with you.

22 WH: Johnny, Johnny it's either yes or no.

23 JL: I understand that man, but you been fucking sitting here fucking with me man, you sat there  
24 with your own words and told me it's like I'm feeling like you're gonna throw this sit on me  
25 dude, I didn't even fucking do it, you know what I mean and I told you I'm trying to  
26 (inaudible), I'm trying to have a decent conversation with you, trying to hold my cool with  
27 you right now, I told you I'm fucking detoxing man, you know what I mean and then it's like  
28 I ask you a question I mean are you arresting me or what are you doing, you're like no I'm  
not arresting you at all, and it's like it's a back and forth shit man.

WH: Not yet Johnny.

JL: You know, okay now you're saying not yet, you know what I mean and it's like well hold on  
here you know and it's like you're, you want to throw all this stuff on me, where's our  
**lawyer**, I mean I'm not trying to fuck with you man.

WH: Okay I, I think we're spinning our wheels, I'll put you back up, upstairs.

1 JL: I mean if you want to we'll talk later whatever but it's like it's like it seems like you're  
2 fucking forcing shit on me man, that's what I'm feeling, I'm trying, I was trying to tell you  
that at the beginning of this conversation to begin with.

3 WH: Okay we'll end the conversation and the next time I bring you down, I'll have a polygraph  
4 set up for you.

5 JL: You know I mean it's like fucking well can we, what you can do that without a **lawyer**, I  
6 mean I'm like (inaudible) I don't even got a **lawyer**, I mean how can you just force all this  
without a **lawyer**, I mean I'm not trying you know what I mean I know my rights a little bit  
(inaudible).

7 WH: Okay.

8 JL: But at the same time I'm not trying to fucking tug a war and fuck with you either, it's like  
9 wow, you know what I'm saying.

10 CT 217-218 (emphasis added). Mr. Lewis continued to talk with minimal prompting by the  
11 sergeant.

12 a. State Court Rejection Of Claim

13 The California Court of Appeal rejected Mr. Lewis' contention that he had invoked his right  
14 to counsel. The state appellate court identified the controlling law as *Davis v. United States*, 512  
15 U.S. 452, 459 (1994), which held that a suspect must invoke the right "unambiguously," and  
16 *Berghuis v. Thompkins*, 560 U.S. 370 (2010), which held that police are not required to end the  
17 interrogation or ask clarifying questions when an accused makes a statement "that is ambiguous or  
18 equivocal." Cal. Ct. App. Opinion at 14.

19 Each time that Lewis mentioned a lawyer, it was in connection with  
20 Hanson's suggestion that Lewis take a polygraph test. As discussed  
21 above, these statements are most easily interpreted as expressing  
22 unwillingness to undergo a future polygraph test without benefit of  
counsel rather than an unwillingness to continue the current interview  
without benefit of counsel. At best, Lewis's statements concerning  
counsel were ambiguous, but ambiguous statements about counsel are  
not sufficient to invoke the right to counsel.

23  
24 *Id.* at 14.

25 b. Analysis

26 An accused who has "expressed his desire to deal with the police only through counsel, is not  
27 subject to further interrogation by the authorities until counsel has been made available to him,  
28



1 unless the accused himself initiates further communication, exchanges, or conversations with the  
2 police.” *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981).<sup>3</sup>

3 *Davis v. United States*, 512 U.S. 452 (1994), addressed the question of how “law  
4 enforcement officers should respond when a suspect makes a reference to counsel that is  
5 insufficiently clear to invoke the *Edwards* prohibition on further questioning.” *Davis*, 512 U.S. at  
6 454. The Court concluded that an ambiguous statement does not trigger the *Edwards* duty to stop  
7 the interrogation.

8 [T]he suspect must unambiguously request counsel. As we have  
9 observed, “a statement either is such an assertion of the right to  
10 counsel or it is not.” *Smith v. Illinois*, 469 U.S., at 97–98, 105 S.Ct., at  
11 494 (brackets and internal quotation marks omitted). Although a  
12 suspect need not “speak with the discrimination of an Oxford don,”  
13 post, at 2364 (SOUTER, J., concurring in judgment), he must  
articulate his desire to have counsel present sufficiently clearly that a  
reasonable police officer in the circumstances would understand the  
statement to be a request for an attorney. If the statement fails to meet  
the requisite level of clarity, *Edwards* does not require that the officers  
stop questioning the suspect.

14 *Davis*, 512 U.S. at 459. The Supreme Court also “decline[d] to adopt a rule requiring officers to ask  
15 clarifying questions. If the suspect’s statement is not an unambiguous or unequivocal request for  
16 counsel, the officers have no obligation to stop questioning him.” *Id.*

17 The California Court of Appeal’s determination that Mr. Lewis’ mention of a lawyer was not  
18 an unambiguous request for counsel and therefore did not require that the interrogation stop was not  
19 an unreasonable application of *Davis*. Each time Mr. Lewis mentioned the word “lawyer,” it  
20 appeared in a sentence that seemed ambiguous:

- 21 • “(inaudible) do this without a lawyer, because it’s like, it’s like you’re like throwing  
22 all this at me.”

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23 <sup>3</sup> In *Edwards*, the request was clear: the suspect gave a statement presenting an alibi defense  
24 and then said that he wanted to “make a deal.” The interrogating officer said he wanted a statement,  
25 but did not have authority to negotiate a deal and provided the suspect with a telephone number for a  
26 county attorney. The suspect called the attorney and hung up after a few minutes. He then said “I  
27 want an attorney before making a deal.” *Edwards*, 451 U.S. at 479. Questioning ceased and the  
28 accused was taken to the county jail, but was interrogated again the next morning. When the  
detention officer told him detectives wanted to speak to him, he replied that he did not want to talk  
to anyone. The guard then told him “‘he had’ to talk and then took him to meet with the detectives.”  
*Id.* The officers advised him of his *Miranda* rights, and he made a statement incriminating himself.  
The Court held that this statement was obtained in violation of *Miranda* and was inadmissible. *Id.* at  
487.

1 • “You know, okay now you’re saying not yet, you know what I mean and it’s like  
2 well hold on here you know and it’s like you’re, you want to throw all this stuff on  
3 me, where’s our lawyer, I mean I’m not trying to fuck with you man.”

4 • “You know I mean it’s like fucking well can we, what you can do that without a  
5 lawyer, I mean I’m like (inaudible) I don’t even got a lawyer, I mean how can you  
6 just force all this without a lawyer, I mean I’m not trying you know what I mean I  
7 know my rights a little bit (inaudible).”

8 However, these statements were less ambiguous when viewed in context. Mr. Lewis’ mention of a  
9 lawyer was preceded by an inquiry by the sergeant as to whether Mr. Lewis would agree to take a  
10 polygraph test that afternoon. The state appellate court reasonably determined that Mr. Lewis’  
11 references to a lawyer were an expression of unwillingness to undergo a polygraph without a lawyer  
12 rather than an expression of a desire to talk to a lawyer before continuing the interrogation at that  
13 point. *See* Cal. Ct. App. Opinion at 14. The mere fact that the word “lawyer” crossed Mr. Lewis’  
14 lips was not enough to be an invocation of his right to counsel because his statements were not  
15 unequivocal and unambiguous requests for counsel in connection with the interrogation. *See, e.g.,*  
16 *Davis*, 512 U.S. at 459-62 (“Maybe I should talk to a lawyer” insufficient); *Sechrest v. Ignacio*, 549  
17 F.3d 789, 807 (9th Cir. 2008) (suspect’s mention of an attorney and reference to advice from  
18 attorney that suspect “keep his mouth shut” was not unambiguous request for counsel); *United*  
19 *States v. Younger*, 398 F.3d 1179, 1187 (9th Cir. 2005) (defendant’s statement “[b]ut, excuse me, if I  
20 am right, I can have a lawyer present through all this, right?” does not constitute unambiguous  
21 invocation of right to counsel); *Paulino v. Castro*, 371 F.3d 1083, 1087-88 (9th Cir. 2004) (state  
22 courts’ holding that “Where’s my attorney?” and “You mean it’s gonna take him long to come?,”  
23 plus failure to fill in item on waiver form asking whether suspect wishes to give up right to counsel,  
24 was not unequivocal demand for counsel not unreasonable under AEDPA standard); *Clark v.*  
25 *Murphy*, 331 F.3d 1062, 1070 (9th Cir. 2003) (holding that state court’s conclusion that “I think I  
26 would like to talk to a lawyer” and “should I be telling you, or should I talk to an attorney?” were  
27 not unambiguous requests for counsel was not objectively unreasonable application of *Davis*).  
28 *Davis* did not require that the sergeant ask questions to clarify whether Mr. Lewis wanted to invoke  
his *Miranda* rights before further interrogation. *See Davis*, 512 U.S. at 461-62.

4. Mr. Lewis Did Not Evoke Right To Remain Silent

Mr. Lewis urges here, as in state court, that his requests to remain silent were ignored by the interrogator, thereby making his statement inadmissible. He points to various statements he made toward the end of the interview as demonstrating the sergeant's failure to heed his request to remain silent. As in state court, Mr. Lewis includes this argument about an invocation of his right to remain silent within his claim that he invoked his right to counsel. This court agrees with the state appellate court's view that "such statements have nothing to do with invocation of the right to counsel," Cal. Ct. App. Opinion at 14-15, and therefore need to be analyzed as whether he invoked his right to silence.

Toward the end of his interview, Mr. Lewis stated, "You know what no disrespect or nothing you know what I mean if possible I go up to my cell or whatever cause I'm fucking detoxing right now." CT 207. Sergeant Hanson responded, "Mm hmm," and Mr. Lewis resumed talking. CT 208. Later, Mr. Lewis stated, "(Inaudible) go back to my cell and lay, lay down or something because it's like I'm, I'm fucking, I'm hung the fuck over and I'm detoxing right now you know what I mean and I'm like and I'm not trying to fuck around or nothing but the same time I'm not liking the fact that you're sitting here telling me you're gonna fucking pin this shit on my though you know what I mean I did not." CT 211. The sergeant said he was just "being honest with you" about the questions, and Mr. Lewis continued to talk. *Id.* A few pages later in the transcript, Mr. Lewis said, "I don't know man I feel like I don't know what we're going with this I don't know how far or this or, or what's going on I'd like to go to my room please, you know what I mean but at the same time, I'm not" trying to be difficult. CT 215. Again the sergeant did not refuse to end the interview and said only, "talk some more this afternoon?" to which Mr. Lewis responded, "I'm just saying we can talk whatever okay but right now I'm like fucking you know what I mean I'm getting cotton mouth and all that you know what I mean and it's like, you're, you know what I mean that, I'm just like, I'm not trying to be an ass or nothing but it's like I'm (inaudible) what's going on are you re-arresting me right now or what's the deal here because it's like from here the words that are coming from your mouth is fucking with me dude, it's like I don't." CT 215. A few pages later, the sergeant said, "you told me you didn't want to talk, you wanted to go back to your cell so we'll end

the conversation and you can go back up stairs.” CT 219. Mr. Lewis kept talking and the interview continued for a short while, as reflected by ten more pages of transcript.

a. State Court Rejection of Claim

The California Court of Appeal rejected the suggestion that these statements amounted to an invocation of the right to remain silent.

These statements by Lewis indicate that he was physically uncomfortable and would rather have been lying in his cell than facing Hanson’s questions. However, these statements were not invocations of Lewis’s right to silence. Lewis continued to talk with Hanson after each of these statements, and the last of these statements makes it clear that Lewis remained willing to talk with Hanson, but would rather do it later. We conclude that Lewis did not invoke his right to silence.FN2

FN2. Even if we were to conclude that Hanson’s statements that he would rather be in his cell were ambiguous, the Supreme Court has ruled that, like ambiguous invocations of the right to counsel, ambiguous invocations of the right to silence do not suffice. (*Berghuis v. Thompson*, *supra*, 560 U.S. at p. \_\_\_ [130 S.Ct. at p. 2260]; *People v. Bacon* (2010) 50 Cal.4th 1082, 1107, fn. 5.)

Cal. Ct. App. Opinion at 15.

b. Analysis

An analysis similar to the one discussed above for a request for counsel during a custodial interrogation applies when a suspect invokes his right to remain silent. Specifically, if a suspect indicates in any manner during questioning that he wishes to remain silent, interrogation must cease and any statement obtained thereafter is considered the product of compulsion. *Miranda*, 384 U.S. at 473-74. A suspect who wishes to invoke the right to remain silent must do so unambiguously, however. *Berghuis*, 560 U.S. at 382. “A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that ‘avoid[s] difficulties of proof and . . . provide[s] guidance to officers’ on how to proceed in the face of ambiguity.” *Id.* (quoting *Davis*, 512 U.S. at 458-59). A suspect who “did not say that he wanted to remain silent or that he did not want to talk with the police” has not invoked his right to remain silent. *Berghuis*, 560 U.S. at 382.

The rejection of Mr. Lewis’ claim by the California Court of Appeal was not inconsistent with *Berghuis*, where the Supreme Court had found a failure to invoke the right to remain silent on

1 much more compelling facts. The suspect in *Berghuis* did not say that he wanted to remain silent or  
2 that he did not want to talk to the police; however, he did not answer questions for almost three  
3 hours of interrogation before one question caused him to well up with tears and confess. *See id.* at  
4 375-76. That lengthy silence was not enough to invoke the right to remain silent so as to require a  
5 cessation of the interrogation. *Id.* at 382. The accused's statement, even though it followed a  
6 lengthy silence, was an implicit waiver of the right to remain silent. *See id.* at 385; *see also id.* at  
7 385 ("there is no contention that [the accused] did not understand his rights; and from this it follows  
8 that he knew what he gave up when he spoke").

9       The California Court of Appeal's determination that Mr. Lewis had not invoked his right to  
10 remain silent was not an unreasonable application of clearly established Supreme Court authority.  
11 Mr. Lewis' statements that he would prefer to be in a cell "detoxing" were not a clear invocation of  
12 his right to remain silent. *See, e.g., DeWeaver v. Runnels*, 556 F.3d 995, 998-99 (pre-*Berghuis*  
13 decision applying *Davis* and concluding that the suspect's statement during interview that he wanted  
14 to go back to the jail was not an unambiguous invocation of right to remain silent and therefore he  
15 was not entitled to habeas relief); *Welch v. Harrington*, 2010 WL 4794237, \*9 (E.D. Cal. 2010)  
16 (habeas relief denied because petitioner's statement during interrogation, "I want to go back to my  
17 cell," was not an unambiguous invocation of right to remain silent). Further, the transcript shows  
18 that Mr. Lewis resumed talking after each of these statements, without any intervening question  
19 from the police sergeant. By saying he would rather be elsewhere in one breath and continuing to  
20 talk in the next breath, Mr. Lewis was conveying at least a mixed message and a mixed message is  
21 not an unambiguous invocation of the right to remain silent. Mr. Lewis was a talkative interviewee,  
22 and his decision to continue talking (without a question being posed) after making each of these  
23 statements supports the state appellate court's conclusion that he had not unambiguously invoked his  
24 right to remain silent. *See generally Berghuis*, 560 U.S. at 385 ("As a general proposition, the law  
25 can presume that an individual who, with a full understanding of his or her rights, acts in a manner  
26 inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights  
27 afford.")

1 Mr. Lewis is not entitled to habeas relief on his challenges to the admission of his statement  
2 to the police. The California Court of Appeal's rejection of Mr. Lewis' several challenges to the  
3 admission of his statement to the police was not contrary to or an unreasonable application of clearly  
4 established federal law, as set forth by the U.S. Supreme Court.

5 B. Admission of Evidence Claim

6 Mr. Lewis claims that his right to due process was violated by the admission of certain  
7 evidence unrelated to the crime. The challenged evidence concerned weapons in Mr. Lewis'  
8 possession, blood in a van he once owned, and blood on his clothing. Other than the blood on the  
9 clothing, the evidence was admitted for impeachment of two witnesses who claimed to have memory  
10 problems on the witness stand – memory problems the trial judge thought were feigned.

11 1. State Court Proceedings And State Law Rulings

12 a. The Gerber Knife

13 Evidence was admitted that showed that Mr. Lewis had borrowed a Gerber-brand knife from  
14 Johnny Mahan on one past occasion to deal with some people with whom Mr. Lewis was having a  
15 problem. Mr. Lewis contends that the introduction of this evidence to impeach Mr. Mahan's  
16 credibility violated Mr. Lewis' rights because it suggested that Mr. Lewis had a criminal or violent  
17 propensity. *See* Docket # 1 at 49-51. In Mr. Lewis' view, the evidence had little probative value  
18 because Mr. Mahan's credibility was already discredited (with evidence of his felony convictions,  
19 and his impaired memory due to drug use and a brain injury as a child) but came with a lot of  
20 potential prejudice in that it suggested to the jury that Mr. Lewis had a criminal propensity because  
21 he once borrowed a knife to deal with some people with whom he was having a problem.

22 The evidence regarding the Gerber knife was impeachment evidence to show that he had lied  
23 to police about the reason offered by Mr. Lewis for borrowing the knife. Mr. Mahan had testified  
24 that Mr. Lewis borrowed the Gerber knife to go fishing. RT 315, 317, 324, 335. Evidence then was  
25 presented by the prosecutor (over a defense objection) that Mr. Mahan had told detectives that Mr.  
26 Lewis "came over and was saying the guys at Bovencamp's were giving [Mr. Lewis] a hard time, so  
27 [Mr. Lewis] needed to borrow a knife," and Mr. Mahan lent him the Gerber knife. RT 644.



Although the Gerber knife was not connected to the killing and the particular purpose for borrowing the knife was not critical, Mr. Mahan's credibility was at issue and the contradiction between his statement to the police and his testimony served to impeach that credibility. Mr. Mahan's credibility was at issue because his testimony was contrary to that of other witnesses on important points. Most notably, Ms. Marr told police and testified that Mr. Lewis washed off a knife in Mr. Mahan's kitchen sink in Mr. Mahan's presence on the morning of the killing, whereas Mr. Mahan testified that he did not remember any such incident.<sup>4</sup> And Mr. Mahan had provided a story to police that conflicted with his trial testimony in other ways.<sup>5</sup> The trial court saw Mr. Mahan's credibility as quite significant, and that the Gerber knife evidence went to that credibility:

I think the credibility of Mr. Mahan's overall testimony here, especially in light of the fact that we've had another witness say that they saw something happening with a knife in the apartment, correct, the washing of the knife and the like. . . . Now we have Mr. Mahan knowing nothing about anything on that date. Someone is not being truthful here and so to test his credibility, that's a very critical part of this case. Did someone observe Mr. Lewis washing a knife at an apartment that date? And it's alleged to have happened at Mr. Mahan's apartment. Mr. Mahan was supposed to be, like, within two feet or so and now we have Mr. Mahan having very limited memory of certain things but of other things he seems to. And then previously when questioned by law enforcement, had a pretty darn good memory then. And so I do think his credibility is a critical part on that point. . . . So, for that purpose, I do find that I would allow this impeachment, which is, I think, an express evidence showing you said something on the stand here, previously he said something else. And I think it's very clear it has nothing to do with the same knife. I think that can be cleared up, but it has to do more with what Mr. Mahan is willing to say now about what he may know in the case. And the jury is entitled

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<sup>4</sup> Ms. Marr testified that, after the killing, she and Mr. Lewis drove to the apartment where Mr. Mahan lived and that Mr. Lewis washed the knife in the kitchen sink and then traded the knife with Mr. Mahan for two wooden poles. RT 250-253; *see also* RT 636 (sergeant Hansen's testimony regarding interview of Ms. Marr). Ms. Marr testified that Mr. Mahan was sitting 2-3 feet away from Mr. Lewis when Mr. Lewis was washing the knife. RT 252-53.

By contrast, Mahan testified that he did not recall trading a knife with Mr. Lewis for some poles, and did not recall Mr. Lewis coming to his (Mahan's) home and washing a knife. RT 333.

<sup>5</sup> When he spoke to the police, Mr. Mahan had a much more vivid recollection of an early morning visit from Mr. Lewis than Mr. Mahan recalled on the stand. Mr. Mahan had told police that, during the visit, Mr. Lewis had accused Mr. Mahan of having inappropriate relations with Mr. Lewis' girlfriend. Mr. Mahan also had told the police that, as Mr. Mahan reached into his pocket, Mr. Lewis told him "'don't put your hands in your pocket, like (inaudible) people are going to get stuck around here. Saying he was going to stab people.'" Cal. Ct. App. Opinion, p. 16. At trial, however, Mr. Mahan professed not to remember this information. *Id.*

1 to test his credibility and the like. So, that one, I think that would be  
2 fine under 352.

3 RT 586-87. The trial court suggested to defense counsel that a limiting instruction regarding the  
4 Gerber knife could be given, but counsel did not request such an instruction. (The failure to request  
5 a limiting instruction is the basis for one of the ineffective assistance of counsel claims discussed  
6 later in this order.)

7 b. The Sword and The Blood In The Van

8 Evidence was introduced that connected Mr. Lewis to a van with blood in it and a sword.  
9 The evidence came in to impeach Jarred Stapp, who had (despite telling the police of such a  
10 statement) testified that he did not recall Mr. Lewis telling him that he (Lewis) had killed someone.  
11 Mr. Stapp had lived with Mr. Lewis at the Clean and Sober House, and was called as a witness to  
12 testify about Mr. Lewis' whereabouts around the time of the murder and Mr. Lewis' admission that  
13 he had killed someone. At trial, Mr. Stapp claimed he could not remember much of what he had told  
14 police or of what had transpired between Mr. Stapp and Mr. Lewis due to a preexisting head injury  
15 and being high on methamphetamine. Mr. Lewis' memory was different when he spoke to police  
16 several weeks after the murder.

17 When Stapp had contacted police, he expressed concern about blood  
18 in the van that he had bought from Sovereign (though his call indicates  
19 Lewis as the person who sold him the van). At trial, Stapp was asked,  
"Were you concerned about the fact that you thought there was  
something in your van?" Stapp replied, "I have no idea."

20 In his call to the police, Stapp also said that Lewis "left a sword on the  
21 premises of the clean and sober house property. So I mean, I don't  
22 know what the guy was murdered with or whatever but if it was a big  
23 knife or something like that, there's a sword ya know." At trial, Stapp  
24 said that he had found a sword in the yard at the clean and sober house  
25 and that he had turned it over to the police. When asked if he had told  
the police who he thought the sword belonged to, Stapp replied, "I told  
them it might have been his. I don't know for a fact but...." Stapp was  
then asked, "Do you remember telling law enforcement that you knew  
it belonged to him because you had seen him with it?" and Stapp  
replied, "I seen him with one."

26 The prosecution requested permission from the court to admit the  
27 recorded telephone call that Stapp had made to the police "not only as  
28 a prior inconsistent statement for what he testified to on the stand but  
also to refute his suggestion to this jury that he was unable to really  
recall what took place between he and the defendant." The defense

objected to introduction of the recorded call because it was hearsay and unduly prejudicial. After listening to the tape, the court observed: “The tape doesn’t seem to sound like he has any memory problems whatsoever. Seems pretty clear. He’s not stumbling over what happened or what was in the van. Seemed like a pretty clear memory in this tape.” The court determined that Stapp was “either being deliberately evasive or untruthful” and that his testimony was not due to “an honest memory loss.” The court decided to “allow it in under the hearsay exception since he is subject to being recalled.” The court also overruled the section 352 objection as to Stapp’s concern about blood in the van he bought from Sovereign because the later police interview with Stapp included the police acknowledgment that any blood in the van was from before Van Alstine’s murder and not related to the crime with which Lewis was charged.

Cal. Ct. App. Opinion at 19-20.

The California Court of Appeal rejected Mr. Lewis’ state law challenge to the admission of the evidence of blood in the van and the sword. “The evidence in the recorded phone call that Stapp was concerned about blood in the van was relevant as impeachment to demonstrate to the jury that Stapp’s lack of memory was feigned.” *Id.* at 21. The fact that the evidence involved blood did not require its exclusion. Mr. Stapp had purchased the van before the killing, and it was made clear to the jury that “nothing found in the van was relevant to the charges against Lewis.” *Id.* “Evidence of blood on an object associated with a defendant that is manifestly unrelated to the charges against defendant has little if any prejudicial effect. Jurors understand from their common experience that traces of their own blood may be found on objects associated with them.” *Id.*

The California Court of Appeal also found that Mr. Lewis forfeited his state law claim regarding the admission of the evidence that Mr. Lewis had a sword because the evidence had not been objected to at trial. *Id.* at 21.

c. Blood On Mr. Lewis’ Clothing

The T-shirt Mr. Lewis was wearing when arrested tested positive for the presence of blood. The DNA test results were not ready by the time the hearing was held on a defense motion *in limine* to exclude the blood test results. The trial court stated that, if the DNA test results were not ready by trial time, since the evidence was that there was human blood on the defendant’s clothes, the evidence would be relevant and Lewis could argue about the weight for the jury to give the evidence. The court observed that, on the other hand, if the DNA tests were ready by trial time and

1 showed that the blood was not the victim's blood, that "'pretty much ends [the] value of that  
2 evidence.'" Cal. Ct. App. Opinion at 22. The trial court also "opined, without any final ruling on  
3 Lewis's motion, that the evidence would not be admitted, unless Lewis wished to make some use of  
4 it." *Id.* The DNA test results came back before trial and showed that the blood on Lewis's T-shirt  
5 was his own blood. (The blood was only on one sleeve of the shirt.) The court asked defense  
6 counsel whether he wanted to make further argument, and counsel said he did not "'have an issue  
7 with'" the evidence since it was his client's own blood. *Id.* Defense counsel also did not object to  
8 the criminalist's testimony about the blood test results, and her "testimony was immediately  
9 followed by testimony, without objection, that blood was actually found only on Lewis's T-shirt and  
10 that this blood was his own." *Id.*

11 The California Court of Appeal also found that Mr. Lewis forfeited his state law claim  
12 regarding the admission of the blood test result evidence by withdrawing the motion *in limine* and  
13 not objecting to the evidence at trial. *Id.*

14 2. State Court of Appeal's Rejection of Due Process Claim

15 The California Court of Appeal rejected Lewis' contention that the blood and weapons  
16 evidence, even if properly admitted under state law, could lead the jury to draw improper inferences  
17 about his character, and therefore violated his right to due process. The state appellate court noted  
18 that the U.S. Supreme Court "has expressly reserved opinion on the question at issue," and that the  
19 California Supreme Court has "rejected the assertion that relevant evidence, properly admitted, can  
20 constitute a violation of federal due process rights." *Id.* at 24-25 (citing (*Estelle v. McGuire*, 502  
21 U.S. 62, 75 n.5 (1991) and *People v. Gurule*, 28 Cal. 4th 557, 656 (Cal. 2002)). The California  
22 Court of Appeal was unpersuaded by Mr. Lewis' argument that was based largely on a Ninth Circuit  
23 case, *Garceau v. Woodford*, 275 F.3d 769 (9th Cir. 2001), a case that had been overruled on  
24 procedural grounds in *Woodford v. Garceau*, 538 U.S. 202 (2003). "Because *Garceau* constitutes  
25 neither state nor federal precedent, we decline to consider it when California precedent speaks  
26 clearly on the matter." Cal. Ct. App. Opinion at 25.

3. Analysis of Federal Due Process Claim

Mr. Lewis contends that the admission of the blood and weapons evidence violated his right to due process because it “created a substantial risk that the jury could convict [him] based on a perceived violent propensity.” Docket # 1 at 62. He argues that the existence of “some possible relevance” in the evidence does not negate the due process violation that occurs with the admission of propensity evidence.

The United States Supreme Court has never held that the introduction of propensity or other allegedly prejudicial evidence violates due process. *See Estelle v. McGuire*, 502 U.S. 62, 68-70 (1991). In fact, *Estelle v. McGuire* specifically left open the question regarding propensity evidence. *See id.* at 75 n.5 (“we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of ‘prior crimes’ evidence to show propensity to commit a charged crime”).

In *Estelle v. McGuire*, the defendant was on trial for murder of his infant daughter after she was brought to a hospital and died from numerous injuries suggestive of recent child abuse. Defendant told police the injuries were accidental. Evidence was admitted at trial that the coroner discovered during the autopsy older partially healed injuries that had occurred 6-7 weeks before the child’s death. *Id.* at 65. Evidence of the older injuries was introduced to prove “battered child syndrome,” which “exists when a child has sustained repeated and/or serious injuries by nonaccidental means.” *Id.* at 66. The state appellate court had held that the proof of prior injuries tending to establish battered child syndrome was proper under California law. *Id.* In federal habeas proceedings, the Ninth Circuit found a due process violation based in part on its determination that the evidence was improperly admitted under state law. *Id.* at 66-67. The U.S. Supreme Court first held that the Ninth Circuit had erred in inquiring whether the evidence was properly admitted under state law because “‘federal habeas corpus relief does not lie for errors of state law.’” *Id.* at 67. The Supreme Court then explained:

The evidence of battered child syndrome was relevant to show intent, and nothing in the Due Process Clause of the Fourteenth Amendment requires the State to refrain from introducing relevant evidence simply because the defense chooses not to contest the point. [¶] Concluding, as we do, that the prior injury evidence was relevant to an issue in the

1 case, we need not explore further the apparent assumption of the Court  
2 of Appeals that it is a violation of the due process guaranteed by the  
3 Fourteenth Amendment for evidence that is not relevant to be received  
4 in a criminal trial. We hold that McGuire's due process rights were not  
5 violated by the admission of the evidence. *See Spencer v. Texas*, 385  
6 U.S. 554, 563–564, 87 S.Ct. 648, 653–654, 17 L.Ed.2d 606 (1967)  
7 (“Cases in this Court have long proceeded on the premise that the Due  
8 Process Clause guarantees the fundamental elements of fairness in a  
9 criminal trial.... But it has never been thought that such cases establish  
10 this Court as a rulemaking organ for the promulgation of state rules of  
11 criminal procedure”).

12 *Estelle v. McGuire*, 502 U.S. at 70 (omission in original).

13 The cited case, *Spencer v. Texas*, 385 U.S. at 563, held that the admission of evidence of  
14 prior convictions did not violate due process. The Supreme Court explained in *Spencer* that,  
15 although there may have been other, perhaps better, ways to adjudicate the existence of prior  
16 convictions (e.g., a separate trial on the priors after the trial on the current substantive offense  
17 resulted in a guilty verdict), Texas' use of prior crimes evidence in a “one-stage recidivist trial” did  
18 not violate due process. *Id.* at 563-64. “In the face of the legitimate state purpose and the  
19 long-standing and widespread use that attend the procedure under attack here, we find it impossible  
20 to say that because of the possibility of some collateral prejudice the Texas procedure is rendered  
21 unconstitutional under the Due Process Clause as it has been interpreted and applied in our past  
22 cases.” *Id.* at 564.

23 *Estelle v. McGuire* also cited to *Lisenba v. California*, 314 U.S. 219, 228 (1941), in support  
24 of the conclusion that the introduction of the battered child syndrome evidence did not so infuse the  
25 trial with unfairness as to deny due process of law. *See Estelle v. McGuire*, 502 U.S. at 75. In  
26 *Lisenba*, the Supreme Court rejected a claim that the admission of inflammatory evidence violated  
27 the defendant's due process rights. The evidence at issue in *Lisenba* was live rattlesnakes and  
28 testimony about them to show they had been used by the defendant to murder his wife. “We do not  
sit to review state court action on questions of the propriety of the trial judge's action in the  
admission of evidence. We cannot hold, as petitioner urges, that the introduction and identification  
of the snakes so infused the trial with unfairness as to deny due process of law. The fact that  
evidence admitted as relevant by a court is shocking to the sensibilities of those in the courtroom



1 cannot, for that reason alone, render its reception a violation of due process.” *Lisenba*, 314 U.S. at  
2 228-29.

3       These three Supreme Court cases declined to hold that the admission of prejudicial or  
4 propensity evidence violates the defendant’s due process rights. No Supreme Court cases since  
5 *Estelle v. McGuire* have undermined the holdings in these three cases. In other words, there is no  
6 Supreme Court holding that the admission of prejudicial or propensity evidence violates due  
7 process.

8       When the U.S. Supreme Court “cases give no clear answer to the question presented, let  
9 alone one in [the petitioner’s] favor, ‘it cannot be said that the state court unreasonabl[y] appli[ed]  
10 clearly established Federal law.’ . . . Under the explicit terms of § 2254(d)(1), therefore, relief is  
11 unauthorized.” *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (alterations in original) (quoting  
12 *Carey v. Musladin*, 549 U.S. 70, 77 (2006), and 28 U.S.C. § 2254(d)(1)).

13       Mr. Lewis cannot obtain federal habeas relief on his claim that the admission of the evidence  
14 violated his right to due process because it showed a propensity toward violence. Relief is  
15 precluded because, as discussed above, the United States Supreme Court has never held that the  
16 introduction of propensity or other allegedly prejudicial evidence violates due process. *See Wright*,  
17 552 U.S. at 125-26 (no relief on denial of counsel claim under *United States v. Cronin*, 466 U.S. 648  
18 (1984), because Supreme Court had never determined the standard to apply where attorney appeared  
19 at hearing by speakerphone); *see, e.g., Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009)  
20 (denying habeas relief upon finding that trial court’s admission of irrelevant pornographic materials  
21 was “fundamentally unfair” under Ninth Circuit precedent but not contrary to, or an unreasonable  
22 application of, clearly established Federal law under § 2254(d)); *Alberni v. McDaniel*, 458 F.3d 860,  
23 865 (9th Cir. 2006) (denying habeas relief on claim that due process was violated by admission of  
24 evidence of defendant’s past violent actions and explosive temper to show propensity due to *Estelle*  
25 *v. McGuire*’s reservation of the question whether propensity evidence violates due process); *Moses*  
26 *v. Payne*, 555 F.3d 742, 760 (9th Cir. 2009) (holding that, where balancing test for excluding  
27 evidence is creation of Ninth Circuit law and Supreme Court has not directly considered whether  
28 trial court’s exercise of discretion to exclude evidence violated defendants’ constitutional right to

1 present evidence, state court's failure to use Ninth Circuit's balancing test is not contrary to or an  
2 unreasonable application of clearly established Supreme Court precedent).

3 The Supreme Court has established a general principle of "fundamental fairness," i.e.,  
4 evidence that "is so extremely unfair that its admission violates 'fundamental conceptions of  
5 justice'" may violate due process. *Dowling v. United States*, 493 U.S. 342, 352 (1990) (quoting  
6 *United States v. Lovasco*, 431 U.S. 783, 790 (1977) (due process was not violated by admission of  
7 evidence to identify perpetrator and link him to another perpetrator even though the evidence also  
8 was related to crime of which defendant had been acquitted). Thus, apart from the alleged  
9 impropriety of admitting propensity evidence, the court may consider whether the evidence was "so  
10 extremely unfair that its admission violates 'fundamental conceptions of justice.'" *Id.* However,  
11 Mr. Lewis does not identify any vice in the evidence other than that it tended to show his propensity  
12 for violence, and does not meet the very demanding standard of being so extremely unfair that its  
13 admission violates fundamental conceptions of justice.

14 In this circuit, the admission of prejudicial evidence may make a trial fundamentally unfair  
15 and violate due process "[o]nly if there are no permissible inferences the jury may draw from the  
16 evidence." *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991). "Evidence introduced by  
17 the prosecution will often raise more than one inference, some permissible, some not; we must rely  
18 on the jury to sort them out in light of the court's instructions. Only if there are *no* permissible  
19 inferences the jury may draw from the evidence can its admission violate due process. Even then,  
20 the evidence must 'be of such quality as necessarily prevents a fair trial.' Only under such  
21 circumstances can it be inferred that the jury must have used the evidence for an improper purpose."  
22 *Jammal*, 926 F.2d at 920 (internal citation and footnote omitted).<sup>6</sup>

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23  
24 <sup>6</sup> In *Jammal*, the police found a gun, \$47,000 and drugs in the trunk of Jammal's stolen car  
25 when they arrested Willis, who had stolen Jammal's car; 18 months later, the police found \$135,000  
26 (but no drugs) in the trunk of Jammal's car when they arrested Jammal. At trial, Willis said he had  
27 no idea the drugs and money were in the trunk of Jammal's stolen car until police opened it. The  
28 prosecution urged the jury to infer that both the drugs and the \$47,000 found in the trunk of  
Jammal's car when Willis was arrested belonged to Jammal since Jammal later was arrested also  
with a large stash of cash in his trunk. Jammal unsuccessfully objected that this evidence effectively  
branded him a drug dealer and was therefore inadmissible character evidence. The Ninth Circuit  
explained that state law evidence rules were beside the point in a federal habeas proceeding and any  
problem in the jury inferring that Jammal had put the \$47,000 and drugs in the car earlier (even if

Here, there were permissible inferences that could be drawn from the Gerber knife, sword and blood-in-the-van evidence: that Messrs. Mahan and Stapp were untruthful on the witness stand. The credibility of both these witnesses was at issue, and the prior inconsistent statements impeached their credibility. *See* Cal. Ct. App. Opinion at 17-21. As the state appellate court explained, the knife evidence was relevant for the purpose of impeaching Mr. Mahan, and the blood-in-the-van evidence was relevant for the purpose of impeaching Mr. Stapp. *See id.* The sword evidence also was relevant for the purpose of impeaching Mr. Stapp because, like the blood-in-the-van evidence, it was part of the detailed information in Mr. Stapp's recorded statement to police that contradicted Mr. Stapp's claimed inability to remember any details of his interactions with Mr. Lewis. The jury could draw the inference that Mr. Mahan's and Mr. Stapp's trial testimony was not credible due to the divergence between their recorded statements to the police and their testimony in court. Because this inference is permissible, the state appellate court did not unreasonably apply Supreme Court authorities in holding that the admission of the knife, sword and blood-in-the-van evidence did not violate due process. *See Jammal*, 926 F.2d at 920.

Mr. Lewis contends that the impeachment evidence was unnecessary because Mr. Mahan and Mr. Stapp already had credibility problems. The fact that the witnesses may have had general credibility problems based on their foggy memories as well as their history of drug use and brain injuries does not mean that it was improper to admit the evidence of prior inconsistent statements that showed them to be lying on the witness stand. *See generally Sivak v. Hardison*, 658 F.3d 898, 916 (9th Cir. 2011) ("There is a substantial difference between 'general evidence of

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impermissible under state law) was not a constitutional problem because the inference that Jammal had put both the \$47,000 and drugs in the trunk on an earlier occasion was a "rational inference" the jury could draw from the evidence that he was caught with \$135,000 in his trunk. *Jammal*, 926 F.2d at 920.

*Jammal* is one of the few cases that gives any guidance as to what might amount to the introduction of evidence that might amount to fundamental unfairness. The Ninth Circuit continues to use the *Jammal* "permissible inference" test in habeas cases governed by the AEDPA. *See, e.g., Noel v. Lewis*, 605 F. App'x 606, 608 (9th Cir. 2015) (admission of gang evidence did not violate due process); *Lundin v. Kernan*, 583 F. App'x 686, 687 (9th Cir. 2014) (citing *Jammal* and concluding that admission of graffiti evidence did not violate due process because there were permissible inferences to be drawn); *Gonzalez v. Knowles*, 515 F.3d 1006, 1011 (9th Cir. 2008) (citing *Jammal* and concluding that evidence of prior bad acts did not violate due process).

1 untrustworthiness and specific evidence that a witness has lied.” (quoting *Benn v. Lambert*, 283  
2 F.3d 1040, 1056-57 (9th Cir. 2002)).

3 Any possibility that the evidence made the trial fundamentally unfair was even more remote  
4 because the jury was made aware that the Gerber knife, the blood in the van, and the sword were not  
5 connected to the killing for which Mr. Lewis was on trial. And the jury was informed that the van  
6 with the blood in it belonged to Ms. Sovereign, rather than Mr. Lewis, further suggesting the lack of  
7 connection between that blood and Mr. Lewis or the murder.

8 The evidence of the blood on the T-shirt Mr. Lewis was wearing at the time of his arrest does  
9 not appear to have been relevant – except possibly to show the thoroughness of the investigation, as  
10 respondent argued in state court, *see* Docket # 21-1 at 55 -- but the jury was made aware that the  
11 blood was Mr. Lewis’ blood and not that of the victim. There was no evidence that Mr. Lewis was  
12 injured, let alone cut, when he stabbed the victim. There was no suggestion that the blood on Mr.  
13 Lewis’ shirt was connected to the stabbing, and the T-shirt was one that Mr. Lewis was wearing two  
14 weeks after the killing. As the state appellate court noted, “[j]urors understand from their common  
15 experience that traces of their own blood may be found on objects associated with them.” Cal. Ct.  
16 App. Opinion at 21. The admission of the evidence that Mr. Lewis’ own blood was on his T-shirt  
17 did not render his trial fundamentally unfair. “Even if there are no permissible inferences the jury  
18 can draw from the evidence in question, due process is violated only if the evidence is ‘of such  
19 quality as necessarily prevents a fair trial.’” *Hovey v. Ayers*, 458 F.3d 892, 923 (9th Cir. 2006)  
20 (quoting *Jammal*, 926 F.2d at 920); *see e.g., id.* (due process not violated by admission of  
21 “emotionally compelling” evidence showing victim as a young girl, even though it was irrelevant);  
22 *Plascencia v. Alameida*, 467 F.3d 1190, 1203-04 (9th Cir. 2006) (citing *Jammal* and concluding that  
23 some evidence about the use of a drug was irrelevant but its admission did not make the trial  
24 fundamentally unfair).

25 “[E]valuating whether a rule application was unreasonable requires considering the rule’s  
26 specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-  
27 by-case determinations.” *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). Bearing in mind the  
28 extremely general nature of the Supreme Court’s articulation of a principle of “fundamental

1 fairness” – i.e., evidence that “is so extremely unfair that its admission violates ‘fundamental  
 2 conceptions of justice’” may violate due process, (*see Dowling*, 493 U.S. at 352) – the California  
 3 Court of Appeal’s rejection of Mr. Lewis’ due process claim was not contrary to or an unreasonable  
 4 application of clearly established federal law as set forth by the Supreme Court. *See*  
 5 *generally Holley*, 568 F.3d at 1101 (denying writ because, although Supreme Court “has been clear  
 6 that a writ should be issued when constitutional errors have rendered the trial fundamentally unfair,  
 7 it has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence  
 8 constitutes a due process violation sufficient to warrant issuance of the writ.” (internal citation  
 9 omitted)).

#### 10 C. Ineffective Assistance of Counsel Claims

11 Mr. Lewis contends that he received ineffective assistance of counsel because trial counsel  
 12 failed to request a limiting instruction for the Gerber knife evidence and failed to renew his  
 13 objection to the evidence of the blood test results for the T-shirt.

##### 14 1. State Court Decision

15 The California Court of Appeal rejected the ineffective assistance of counsel claim. That  
 16 court correctly identified *Strickland v. Washington*, 466 U.S. 668, 687 (1984), as the governing  
 17 standard and applied it. Cal. Ct. App. Opinion at 23. The court noted *Strickland*’s command that  
 18 “[j]udicial scrutiny of counsel’s performance must be highly deferential,” and should strive to  
 19 avoid “the distorting effects of hindsight.” *Id.* (quoting *Strickland*, 466 U.S. at 689). The state  
 20 appellate court concluded there was no deficient performance by counsel.

21 The trial court offered to give a limiting instruction concerning  
 22 Mahan’s statements to police about the Gerber knife. Lewis’s counsel  
 23 decided not to request such an instruction, believing that doing so  
 24 would cause confusion or bring more attention to the matter. Defense  
 25 counsel made a tactical choice not to request a limiting instruction on  
 26 considerations that are commonly of concern in courtroom practice.  
 27 Nothing in the record leads us to believe that counsel’s choice fell  
 28 below the standards of reasonable decision making.

As for the evidence about blood on Lewis’s clothing, the record does  
 not indicate a reason for defense counsel’s failure to object to its  
 admission. The evidence conclusively showed that where blood had  
 actually been detected on Lewis’s clothing, it was Lewis’s own blood.  
 This was potentially useful to the defense and nothing in the record  
 supports an argument that defense counsel did not make a tactical

1 decision to allow the jury to hear that the victim's blood was not on  
 2 Lewis's clothing or that such a decision would have been  
 3 unreasonable. Because the failure to object to the admission of this  
 blood evidence may have been a valid, tactical choice by defense  
 counsel, this argument for ineffective assistance also fails.

4 Cal. Ct. of Appeal Opinion at 24.

5 2. Analysis

6 The Sixth Amendment's right to counsel guarantees not only assistance, but effective  
 7 assistance, of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The benchmark for  
 8 judging any claim of ineffectiveness is whether counsel's conduct so undermined the proper  
 9 functioning of the adversarial process that the trial cannot be relied upon as having produced a just  
 10 result. *Id.* In order to prevail on a Sixth Amendment ineffectiveness of counsel claim, a petitioner  
 11 must establish two things. First, he must demonstrate that counsel's performance was deficient and  
 12 fell below an "objective standard of reasonableness" under prevailing professional norms. *Id.* at  
 13 687-88. Second, he must establish that he was prejudiced by counsel's deficient performance, i.e.,  
 14 that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the  
 15 proceeding would have been different." *Id.* at 694. A reasonable probability is a probability  
 16 sufficient to undermine confidence in the outcome. *Id.* The relevant inquiry under *Strickland* is not  
 17 what defense counsel could have done, but rather whether his choices were reasonable. *See Babbitt*  
 18 *v. Calderon*, 151 F.3d 1170, 1173 (9th Cir. 1998).

19 A "doubly" deferential judicial review is appropriate in analyzing ineffective assistance of  
 20 counsel claims under § 2254. *See Cullen v. Pinholster*, 131 S. Ct. 1388, 1410-11 (2011). The  
 21 "question is not whether counsel's actions were reasonable. The question is whether there is any  
 22 reasonable argument that counsel satisfied *Strickland's* deferential standard." *Harrington v. Richter*,  
 23 562 U.S. 86, 105 (2011).

24 a. Failing To Request A Limiting Instruction On The Gerber Knife

25 The record clearly supports the California Court of Appeal's finding that trial counsel made a  
 26 tactical decision not to request a limiting instruction about the Gerber knife. During a discussion of  
 27 the jury instructions, the court asked whether either counsel wanted to say anything about the jury  
 28 instructions, and defense counsel responded that he had chosen not to ask for a limiting instruction



1 because it would be more confusing or call attention to the evidence.<sup>7</sup> It was not an unreasonable  
 2 application of *Strickland* for the California Court of Appeal to determine that counsel did not engage  
 3 in deficient performance when he made a tactical decision not to request a limiting instruction so as  
 4 to avoid confusing the jury and drawing further attention to the Gerber knife evidence. Evidence  
 5 had been presented that the Gerber knife was not connected to the murder, i.e., the knife was  
 6 borrowed and returned long before the killing, and even was sold to a pawn shop before the killing.  
 7 See RT 324, 329, 649-651. The trial court provided the jury a general instruction on evaluating  
 8 witness credibility (CT 321), and it was not deficient performance for counsel to believe that asking  
 9 for a specific limiting instruction regarding the Gerber knife would unduly emphasize the  
 10 importance of that knife and might confuse some jurors. Counsel argued in closing that none of the  
 11 knives were connected to the killing. RT 748-751. There was evidence of several knives, and a  
 12 limiting instruction as to this particular knife would have given it an air of importance that it did not

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14 <sup>7</sup> At a discussion of jury instructions, the following exchange occurred:

15 THE COURT: [D]id either counsel wish to state anything for the record, then, regarding the  
 16 instructions?

17 [THE PROSECUTOR]: There was one submitted by counsel during the trial, your Honor. I  
 18 understand he has withdrawn that instruction. It was a special instruction.

19 [DEFENSE COUNSEL]: It was regarding the impeachment issue and I'll leave the  
 20 instruction in its present form. I think it's confusing, otherwise.

21 THE COURT: Oh. There was an indication on the record that he would be asking for some  
 22 type of limiting instruction, but you decided not to do that because that would just confuse or  
 23 call more attention to something?

24 [DEFENSE COUNSEL]: I believe so.

25 THE COURT: Okay. Okay. So, then, we'll give – you are in agreement with the instructions  
 26 as they are, relative to impeachment and contradictory statements, that is, conflicting  
 27 statements, I guess is what it was?

28 [DEFENSE COUNSEL]: Yes.

THE COURT: Prior inconsistent statements area. Thank you for clarifying that. You aren't  
 asking for any additional instructions, [defense counsel]?

[DEFENSE COUNSEL]: I'm not.

RT 689-90.

1 deserve and that the defense did not desire. Mr. Lewis has not overcome the “‘strong presumption’  
 2 that counsel’s attention to certain issues to the exclusion of others reflects trial tactics rather than  
 3 ‘sheer neglect.’” *Harrington v. Richter*, 562 U.S. 86, 109 (2011) (quoting *Yarborough v. Gentry*,  
 4 540 U.S. 1 (2003) (per curiam)).

5 Although the California Court of Appeal did not reach the prejudice prong of the *Strickland*  
 6 test, there is no showing of prejudice by Mr. Lewis. There is no evidence that suggests a  
 7 “reasonable probability” of a different outcome if the jury had received a limiting instruction for the  
 8 Gerber knife evidence. The testimony of Mr. Mahan and a police sergeant established that the  
 9 Gerber knife was not connected to the murder. In fact, none of the items seized from Mr. Mahan’s  
 10 house were ever connected in any physical way to the killing. RT 651. Coupled with this evidence  
 11 that showed the Gerber knife was not connected to the killing, there was strong inculpatory  
 12 evidence. The evidence included the following: while Ms. Marr drove Mr. Lewis around Eureka,  
 13 Mr. Lewis asked her to stop and invited the victim to get in the car; Mr. Lewis told Ms. Marr to  
 14 drive to Fields Landing, where the victim was stabbed and died; Mr. Lewis told Ms. Marr during the  
 15 drive that the victim had slept with Mr. Lewis’ girlfriend; Ms. Marr demonstrated the attack she saw  
 16 by standing behind a detective and reaching around to punch him in the right side; the victim’s stab  
 17 wound was consistent with a person standing behind him and reaching around to stab the victim in  
 18 the chest; Ms. Marr said that Mr. Lewis got back in the car and said, “I stabbed the guy. He’s going  
 19 to die soon,” RT 636; Ms. Marr saw Mr. Lewis cleaning a knife at Mr. Mahan’s place later on the  
 20 morning of the killing; and Mr. Stapp told police that, several days after the killing, Mr. Lewis told  
 21 him, “I killed somebody,” RT 543. The Gerber knife evidence was quite limited – i.e., that Mr.  
 22 Mahan had loaned Mr. Lewis a Gerber knife long before the killing to deal with a problem with the  
 23 Bovencamps – and a limiting instruction would have had no reasonable probability of altering the  
 24 outcome of the proceedings. Mr. Lewis is not entitled to the writ on his claim that counsel was  
 25 ineffective in not requesting a limiting instruction on the Gerber knife evidence.

26 b. Failing To Renew An Objection to The Blood Test Results

27 Defense counsel initially objected to the blood test results at a time when those results  
 28 showed that there was human blood on Mr. Lewis’ T-shirt but not whose blood it was. Once further

1 tests revealed that it was Mr. Lewis' own blood, counsel did not renew his objection to the  
2 introduction of blood test results. Although counsel did not object to the evidence of the blood test  
3 results, that evidence was not harmful to Mr. Lewis because the evidence was collected long after  
4 the killing, involved only a small amount of blood on a sleeve of a shirt, and was Mr. Lewis' blood.  
5 *See* RT 450 (the clothes were collected from Mr. Lewis on December 3, two weeks after the  
6 stabbing); RT 450, 464 (only a small amount of blood had been found, i.e., a "brownish red staining  
7 on the sleeve cuff" on one sleeve of the T-shirt); RT 466, 515 (the blood stain on the T-shirt was Mr.  
8 Lewis' own blood). No effort was made to suggest the blood was not Mr. Lewis' blood.

9       It was not an unreasonable application of *Strickland* for the California Court of Appeal to  
10 determine that counsel did not engage in deficient performance when he did not renew his objection  
11 to the blood test results. The state appellate court observed that the evidence that it was Mr. Lewis'  
12 blood (and not the victim's) on the T-shirt was "potentially useful to the defense and nothing in the  
13 record supports an argument that defense counsel did not make a tactical decision to allow the jury  
14 to hear that the victim's blood was not on Lewis's clothing or that such a decision would have been  
15 unreasonable." Cal. Ct. App. Opinion at 24. Applying the "'highly deferential' look at counsel's  
16 performance . . . through § 2254(d)'s 'deferential lens,'" *Cullen v. Pinholster*, 131 S. Ct. at 1403, it  
17 cannot be said that the California Court of Appeal's rejection of Mr. Lewis' claim was contrary to or  
18 an unreasonable application of *Strickland*. The California Court of Appeal's analysis presents a  
19 "reasonable argument that counsel satisfied *Strickland*'s deferential standard," and that is sufficient  
20 to bar relief under § 2254(d). *See Harrington v. Richter*, 562 U.S. at 105. Mr. Lewis is not entitled  
21 to the writ on this claim.

22 D. A Certificate Of Appealability Will Not Issue

23       Mr. Lewis has not "made a substantial showing of the denial of a constitutional right," 28  
24 U.S.C. § 2253(c)(2), and this is not a case in which "reasonable jurists would find the district court's  
25 assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484  
26 (2000). Accordingly, a certificate of appealability is **DENIED**.

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28 ///

VI. CONCLUSION

The petition for writ of habeas corpus is **DENIED** on the merits. The Clerk shall close the file.

IT IS SO ORDERED.

Dated: October 14, 2015

  
EDWARD M. CHEN  
United States District Judge